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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RACHEL GASSO, on behalf of herself and all consumers similarly situated,

Plaintiffs,

v.

ALLSTAR MARKETING GROUP, INC., ALLSTAR MARKETING GROUP, LLC, ALLSTAR MARKETING CORP., and DOES 1-25, inclusive,

Defendants.

Case No.: 07 CV 2235 BTM (BLM)

NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[Per chambers, no oral argument unless requested by the Court]

Hearing
Date: January 25, 2008
Time: 11:00 a.m.
Dept.: Courtroom of the Honorable Barry Ted Moskowitz

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on January 25, 2008, at 11:00 a.m. or as soon thereafter as the matter can be heard, in the Courtroom of the Honorable Barry Ted Moskowitz of the United States District Court for the Southern District of California (Courtroom 15, 5th Floor), located at 940 Front Street, San Diego, California 92101-9800, Defendants will, and hereby do, move the Court for an order dismissing the First, Second, and Third Causes of Action of the Complaint to the extent that they are being

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asserted on behalf of putative class members who are not residents of California, and dismissing the Fourth Cause of Action in its entirety.

The motion as to the First, Second, and Third Causes of Action is made pursuant to Fed.R.Civ.P. 12(b)(6), on the grounds that the California statutes on which such alleged claims are based cannot be applied to nonresidents of California, and accordingly no claim upon which relief can be granted can be stated by putative class plaintiffs who are not residents of California. The Motion as to the Fourth Cause of Action, for fraud, is made pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6), on the grounds that the Complaint fails to plead fraud with particularity.

This motion is based upon this notice and accompanying memorandum of points and authorities, the complete files and records in this action, and such other argument and evidence as may be presented at or before the hearing of this matter.

Dated: December 3, 2007

VENABLE LLP

By [signature]
Jeffrey M. Tanzer
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the sale of a product known as "Auto Cool," and has come to this Court after removal from the San Diego County Superior Court under the Class Action Fairness Act, 28 U.S.C. § 1332(d). While plaintiff Rachel Gasso purports to bring the case "individually and on behalf of the California general public," the class description contains no geographical limitation, and plaintiff affirmatively alleges that the action may properly be maintained as a national class action. Plaintiff purports to assert her alleged claims on behalf of a class consisting of all individuals (wherever located) who purchased Auto Cool products since 2003.

It is well-established, however, that the consumer protection statutes under which the lawsuit is purportedly brought have no "force or operation beyond the boundaries of the state,"[1] and may not be applied to non-residents of California without an appropriate nexus to California. No such nexus is apparent in the Complaint or can be alleged here. Accordingly, defendants Allstar Marketing Group, LLC, Allstar Marketing Group, Inc., Allstar Marketing Corp. (collectively referred to as "Allstar") are moving to dismiss all of the statutory claims to the extent that they are being asserted on behalf of putative class members who are not residents of California.[2]

Allstar is also moving to dismiss the common law fraud claim, since it fails to allege fraud with the particularity that is required under Fed.R.Civ.P. 9(b).

II. SUMMARY OF PERTINENT FACTS

Plaintiff alleges in the Complaint that the Allstar entities are based in the State of New York, and that they market and sell Auto Cool products throughout the United

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1 Norwest Mortgage, Inc. v. Superior Court, 72 Cal.App.4th 214, 222, 85 Cal.Rptr.2d 18 (1999).

2 It appears that Allstar Marketing Group, Inc. and Allstar Marketing Corp. were erroneously sued here, in that these entities had nothing whatsoever to do with the sale of Auto Cool products. Their dismissal from the case will be sought at an appropriate juncture, after a factual record has been developed.

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States and in California. (Complaint, ¶ 7.) Auto Cool is marketed as a product that keeps cars cooler. (Id., ¶ 1.) Plaintiff alleges that the product does not work as advertised, that the name "Auto Cool" is misleading, and that Allstar has engaged in marketing and advertising "aimed at creating the perception that Auto Cool" "Keeps your parked car cooler" and "Keeps your car cool no matter how long it was been left in the sun." (¶ 14.) While the pleading is ambiguous on the latter subject – it is not clear from the Complaint whether the last two quoted phrases are advertising statements that were actually encountered by plaintiff prior to purchasing the product – the gist of the Complaint is plaintiff's contention that such phrases could be misleading.[3]

Plaintiff also alleges, without further specification, that Allstar has "been aware of the lack of truth about the benefits" of the product, and that "consumer reviews and testing throughout the U.S. reveal that Auto Cool simply does not work as advertised." (Complaint, ¶ 15.) No detail is provided about when such testing occurred or when Allstar allegedly became aware of such information about the product.

Plaintiff purports to bring her claims on behalf of a class consisting of "All individuals who purchased one or more Auto Cool devices" since January 1, 2003, with exceptions only for defendant-related or Court-related persons. (Complaint, ¶ 16.) The class description does not contain any limitation to California residents or to activity that occurred in California. Each of the causes of action is purportedly asserted on behalf of this putative class, as well as the California general public.[4]

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[3] In the context of a motion to dismiss, Allstar acknowledges that it is not appropriate to contest plaintiff's allegation of facts, and reserves the right to respond at the appropriate time.

[4] It appears that the references in the Complaint to the "general public" are legally immaterial. Subsequent to California Proposition 64, which was passed in 2004, California's unfair competition law contains no reference to actions brought on behalf of the "general public." Business & Professions Code § 17203 requires that any state court class action be brought in compliance with § 17204 and California Code of Civil Procedure § 382. Nor is there any concept of a mass action being brought on behalf of the "general public" under California's Consumers Legal Remedies Act, see California Civil Code, §§ 1750 et seq., or Fed.R.Civ.P. 23.

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Based on the foregoing, plaintiff purports to assert class claims under California's unfair competition law and false advertising law, Business & Professions Code §§ 17200 et seq. (first cause of action), and §§ 17500 et seq. (second cause of action), the California Consumers Legal Remedies Act, Civil Code §§ 1770 et seq. (third cause of action), and for common law fraud (fourth cause of action). The statutory claims are barred to the extent that they are asserted on behalf of putative class members who are not residents of California or with regard to conduct outside California, and the fraud claim should be dismissed because of plaintiff's failure to state a claim with the particularity required by Fed.R.Civ.P. 9(b).[5]

III. ARGUMENT

A. The Statutory Claims Should Be Dismissed As To Putative Class Members Who Are Not Residents Of California Because The Pertinent Laws Do Not Apply To Out-of-State Conduct.

Except for the thinly-pled fraud claim, plaintiff's Complaint involves only statutory claims purportedly arising under California's unfair competition law ("UCL") and Consumers Legal Remedies Act ("CLRA"). As discussed further below, these claims are subject to dismissal on a motion brought under Fed.R.Civ.P. 12(b)(6) to the extent that they are purportedly brought on behalf of nonresidents of California, because the statutes do not apply to extraterritorial conduct.

The UCL potentially applies to and provides remedies for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading

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[5] We are mindful of the principle that procedural defects like class "manageability" are typically considered in certification proceedings under Fed.R.Civ.P. 23, rather than on a motion to dismiss. Gillibeau v. City of Richmond, 417 F.2d 426, 432 (9th Cir. 1969), Accordingly, this motion is addressed to the inability of putative nonresident class members to state a claim for relief, and not to the fact that, in any event, it is rarely if ever appropriate to certify a nationwide class in nonfederal question suits, because of the legal and factual variations affecting members of such a purported class. See, e.g., G. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1177-78, *amended by and reh'g denied*, 273 F.3d 1266 (9th Cir. 2001) (the need to apply the laws of a multitude of jurisdictions precludes nationwide class certification); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (same).

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advertising." California Business & Professions Code § 17200. Section 17500, in turn, makes unlawful any advertising "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." The CLRA provides various consumer remedies for, among other things, deceptive acts or practices undertaken in connection with the advertising and sale of consumer products. See California Civil Code § 1770.

The California courts have held in no uncertain terms that statutes such as the UCL and CLRA may not be construed to regulate occurrences outside the state of California, unless a contrary intention is clearly expressed or can reasonably be inferred from the language of the statute. Norwest Mortgage, Inc. v. Superior Court, 72 Cal.App.4th 214, 222, 85 Cal.Rptr.2d 18 (1999); J.P. Morgan & Co., Inc. v. Superior Court, 113 Cal.App.4th 195, 221, 6 Cal.Rptr.3d 214 (2003). The UCL and CLRA express no such intention.

Norwest involved an appeal from the certification of a nationwide class in a case involving the cost of insurance. Norwest was a company incorporated in California but with its principal place of business in another state, which engaged in lending money to homeowners nationwide. The appellate court overturned the certification order, holding that the UCL does not apply to out-of-state activity that allegedly injures nonresidents. 72 Cal.App.4th at 226. This is the case because of the due process concerns addressed in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985): in order for a court to apply the law of the forum, the forum "must have significant contact or a significant aggregation of contacts to the claims asserted by each member of the plaintiff class to ensure that application of the forum law to each plaintiff's claim is not arbitrary or unfair." Norwest, 72 Cal.App.4th at 226. Since the UCL does not apply to actions occurring outside California that injure nonresidents, and no showing could be made of activity inside California that injured nonresidents, claims asserted by nonresidents could not go forward. Id.

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Federal Courts in California have repeatedly recognized that, under the principles set forth in Norwest, it is appropriate at the pleading stage to dismiss purported claims brought by nonresidents, where the complaint fails to allege activities in California that injured nonresidents.

In Standfacts Credit Services, Inc. v. Experian Information Solutions, Inc., 405 F.Supp.2d 1141 (C.D. Cal. 2005), the defendants were the three primary credit reporting agencies, and plaintiffs were a purported class of independent credit reporting agencies who purchase, process and resell credit reports from the defendants. The class plaintiffs purported to state a claim for relief for deceptive business practices in violation of the UCL. The two non-resident defendants moved to dismiss the UCL claim to the extent that it was brought by class plaintiffs who were not residents of California. Because of the presumption that California statutes have no "force or operation beyond the boundaries of the state," id. at 1148, and because the complaint failed to allege specific conduct in California that injured nonresidents, the court dismissed with prejudice the UCL claims brought by nonresident plaintiffs against nonresident defendants.

Other courts have similarly concluded, both in the class and non-class context, that where a complaint fails to allege significant California activity that injured nonresidents, claims by nonresident plaintiffs against nonresident defendants that are purportedly brought under California's unfair practices statutes should be dismissed. See In re National Western Life Ins. Deferred Annuities Litigation, 467 F.Supp.2d 1071, 1089 (S.D. Cal. 2006) (dismissing unfair competition and false advertising claims by nonresident putative class plaintiffs where complaint failed to allege California activity that injured them); Speyer v. Avis Rent a Car System, Inc., 415 F.Supp.2d 1090, 1099 (S.D. Cal. 2005) (granting motion to dismiss UCL claim in putative class action and noting that UCL may not apply in circumstances where out-of-state conduct may not have caused injury in California); Meridian Project Systems, Inc. v. Hardin Const. Co., LLC, 404 F.Supp.2d 1214, 1225-26 (E.D. Cal. 2005) (dismissing statutory

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claim for unfair business practices where no specific misconduct affecting an out-of-state plaintiff was alleged).

In the Complaint at issue here, Allstar is alleged to be a New York company. (Complaint, ¶ 7). The class definition – "All individuals who purchased one or more Auto Cool devices . . ." (id., ¶ 16) – is not limited to California residents or transactions, and the Complaint fails to allege any conduct by Allstar inside California that affected nonresidents. Accordingly, the first, second, and third causes of action, which allege California statutory claims, should be dismissed to the extent they are purportedly being asserted on behalf of nonresident putative class plaintiffs.

B. The Fraud Claim Should Be Dismissed Because Of Plaintiff's Failure To Plead Fraud With Sufficient Particularity.

As a preliminary matter, we note that the requirement of Fed.R.Civ.P. 9(b) that fraud must be pled with particularity fully applies to fraud claims purportedly arising under state law. Thus, where a complaint fails to plead fraud with sufficient particularity, the claims should be dismissed. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003).

Here, without attempting to differentiate among the three Allstar defendants, plaintiff merely alleges that Allstar's marketing and advertising of Auto Cool products were "deceptive, misleading and injurious to consumers." The Complaint generally refers to advertising (¶¶ 14 and 35), but fails to identify how or when any alleged misrepresentation was made to plaintiff or anyone else, or by whom. With regard to the allegedly intentional nature of Allstar's conduct,[6] plaintiff merely alleges that

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[6] While Rule 9(b) is the appropriate standard for assessing whether "the circumstances of the fraud" have been pled with sufficient particularity, "a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action." Vess, supra, 317 F.3d at 1103. To state a cause of action for fraud under California law, the following must be alleged: (1) The representation of a past or existing material fact by the defendant; (2) The falsity of the representation; (3) The defendant's knowledge that the representation was false when made; (4) The defendant's intent to defraud for the purpose of inducing detrimental reliance; (5) The plaintiff's ignorance of the falsity of the representation and the plaintiff's justifiable detrimental reliance thereon; and (6) Damage sustained by the plaintiff as a proximate result of defendant's

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"consumer reviews and testing throughout the U.S. reveal" that the product does not work as advertised (¶ 15), but does not identify such "reviews and testing" or allege when or if Allstar became aware of them. Thus, the Complaint fails to satisfy the particularity requirement of Rule 9(b) in at least three respects:

First, the Complaint utterly fails to satisfy the basic requirement that "the who, what, when, where, and how" of alleged fraudulent conduct must be specifically alleged. Vess, supra, 317 F.3d at 1106. Plaintiff makes no more than passing reference to a few asserted advertising claims, but does not identify how or when or by whom they were made. Thus, the situation is similar to Gilleon v. Medtronic USA, Inc., 2002 WL 31300694 (N.D. Cal. 2002), where a common law fraud claim was dismissed for failure to plead with particularity. That case involved claims arising from the sale of medical devices. Plaintiffs alleged that representations were made to patients, physicians and the general public that the product was safe for use in certain medical procedures, and that such representations were false because there was inadequate testing and it was known that there frequent severe side effects and that the product caused injuries. The court held that such fraud claims, based on defendants' asserted misrepresentations to the general public, had to be dismissed because the "who, what, when and where" were wholly absent. See also Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir.1989) (mere conclusory allegations of fraud are insufficient; the time, place, and nature of alleged fraudulent activities must be specifically alleged).

Second, the "knowing falsity" element of a fraud claim is not alleged with any specificity. Plaintiff refers generally to "consumer reviews and testing" that assertedly show that the Auto Cool product does not always work as advertised, but does not identify any such reviews or tests, and cannot allege that any statements attributable to Allstar were knowingly false when made. A fraud claim cannot be founded on such a

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representation. See Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977 (1949); Continental Airlines, Inc. v. McDonnell Douglas Corp., 216 Cal. App. 3d 388, 402, 264 Cal.Rptr. 779 (1990).

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slight "factual" foundation – "If such unsupported general claims were sufficient to satisfy Rule 9(b)'s particularity requirements, plaintiffs could eliminate the falsity requirement entirely because they could merely identify a given statement by the defendant and then simply allege that the substance of the statement was contradicted by contemporaneous information contained in internal reports. Thus any statement could be alleged to have been false at the time made. Such a standard would clearly be inconsistent with our requirement that 'circumstances indicating falseness be set forth.'" Yourish v. California Amplifier, 191 F.3d 983, 994-95 (9th Cir. 1999) (holding that, in the securities law context, the falsity requirement was not satisfied where the complaint generally alleged that confidential non-public information was available to defendants that revealed "true facts" inconsistent with contemporaneous statements).

Third, the Complaint makes no effort to differentiate among the three named Allstar entities, or to state or define the role of any of them in alleged fraudulent conduct. In a fraud suit involving multiple defendants, a plaintiff must set forth the role of each defendant in the alleged fraudulent scheme. "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007).

IV. CONCLUSION

For the reasons stated herein, Allstar respectfully requests that the First, Second, and Third Causes of Action be dismissed to the extent that they are purportedly being asserted on behalf of putative class members who are not residents of California, and

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that the Fourth Cause of Action be dismissed because of plaintiff's failure to plead fraud with the particularity required by Rule 9(b).

Dated: December 3, 2007

VENABLE LLP

By [signature]
Jeffrey M. Tanzer
Attorneys for Defendants

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, #2100, Los Angeles, California 90067.

On December 3, 2007, I served the foregoing document(s) described as **NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on the interested parties in this action addressed as follows:

Alexander M. Schack, Esq. *Attorneys for Plaintiff*
Lee T. Patajo, Esq.
LAW OFFICES OF ALEXANDER M. SCHACK
16870 West Bernardo Drive, Suite 400
San Diego, CA 92127

☒ By placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above.

☐ **BY PERSONAL SERVICE (CCP §1011)**: I delivered such envelope(s) by hand to the addressee(s) as stated above.

☒ **BY MAIL (CCP §1013(a)&(b))**: I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the U.S. Postal Service. Under that practice such envelope(s) is deposited with the U.S. postal service on the same day this declaration was executed, with postage thereon fully prepaid at 2049 Century Park East, #2100 Los Angeles, California, in the ordinary course of business.

Executed on December 3, 2007 at Los Angeles, California

☐ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

[signature]

Jesse Rodriguez

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